TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

LIBRARY
SUPREME COURT, U.S.

No. 20

THE UNITED STATES OF AMERICA, APPELLANT

vs.

THE BEACON BRASS CO., INC., and MAURICE FEINBERG

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Filed March 10, 1953

Probable jurisdiction noted April 21, 1953

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 30

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

THE BEACON BRASS CO., INC., and MAURICE FEINBERG

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

INDEX.

1 IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Criminal No. 51-288

THE UNITED STATES

vs.

BEACON BRASS CO., INC. and MAURICE FEINBERG

Docket Entries

1951	
Sept. 14	Indictment returned.
Oct. 29	McCarthy, J. Defendant corporation, by Maurice Feinberg, arraigned and pleaded not guilty.
Oct. 29	McCarthy, J. Defendant Maurice Feinberg arraigned and pleaded not guilty. Ordered to recognize in sum of $1000 (personal). Recog. on file.
Nov. 23	Motion to Dismiss filed by defendants.
Dec. 4	McCarthy, J. Hearing on Defendant's Motion to Dismiss; advisement.
1952	
Jan. 10	McCarthy, J. Memo received and filed allowing Defendant's Motion to Dismiss Indictment. Notice to counsel.
Jan. 10	McCarthy, J. Indictment dismissed.
Feb. 7	Notice of appeal filed by United States. (Copy to counsel)
Feb. 7	Statement as to jurisdiction filed.
Feb. 11	Designation of U.S.A. of Contents of Record on Appeal filed.
Feb. 20	Defendant's designation of contents of record on appeal, filed.

ATTORNEYS

For U. S.:

GEORGE F. GARRITY
United States Attorney

JOSEPH M. HARGEDON
Assistant United States Attorney

HAROLD G. JACKSON
Assistant United States Attorney

For Defendant:

RICHARD MAGUIRE
199 Washington St.
Boston 8, Mass.

2 IN UNITED STATES DISTRICT COURT

Indictment

Filed September 14, 1951

At a District Court of the United States of America, for the District of Massachusetts, begun and holden at Boston, within and for said District, on the third Monday of March in the year of our Lord one thousand nine hundred and fifty-one.

The JURORS for the United States of America, within and for the District of Massachusetts, upon their oath, charge that on or about October 24, 1945, and thereafter, at Boston, in said District, BEACON BRASS CO., INC. a body corporate, with an usual place of business in Waltham, in said District, and MAURICE FEINBERG, of Brookline, in said District, president and treasurer of said corporation, hereinafter called the defendants, did wilfully and knowingly attempt to defeat and evade a large part of the taxes due and owing by the said corporation to the United States of America for the fiscal period ending October 31, 1944, by making certain false and fraudulent statements and representations, at a hearing and conference before representatives and employees of the United States Treasury Department, on or about October 24, 1945, and on other occasions thereafter, concerning payments and disbursements made by the said Beacon Brass Co., Inc., for the purpose of concealing additional unreported net income received by the said Beacon Brass Co., Inc., in said period ending October 31, 1944, and on which said unreported income, as the defendants then and there well knew, there was due and owing to the United States of America a tax of approximately one hundred thirty-four thousand, nine hundred ten dollars and sixty-eight cents, ($134,910.68); in violation of Section 145(b), Internal Revenue Code; 26 U. S. C., Section 145(b).

3 A True Bill.

/s/ W. RANDOLPH SIDES
Foreman of the Grand Jury.

/s/ JOSEPH M. HARGEDON
Asst. United States Attorney for the
District of Massachusetts.

DISTRICT OF MASSACHUSETTS,

September 14, 1951

Returned into the District Court by the Grand Jurors and filed

s/ JOHN F. DAVIS
Deputy Clerk.

(File Endorsement Omitted)

4 IN UNITED STATES DISTRICT COURT

(Title Omitted)

Transcript of Hearing on Arraignment

Filed October 29, 1951

PRESENT:

Mr. Hargedon, for the Government.
R. Maguire, Esq., for the Defendants.

The CLERK. Beacon Brass Company, Inc. and Maurice Feinberg. Maurice Feinberg and Beacon Brass Company, this indictment charges each of you with violation of the income tax law. What say you, Maurice Feinberg? Guilty or Not Guilty?

The DEFENDANT. Not Guilty.

The CLERK. What say you for the Beacon Brass Company?

The DEFENDANT. Not Guilty.

Mr. HARGEDON. Well, may it please the Court, this is an indictment which was brought to supersede a previous indictment which was dismissed by Judge Sweeney, and I ask that bail be set in the sum of one thousand without surety for the individual defendant.

The COURT. That may be done.

Mr. MAGUIRE. May I ask ten days for special pleas?

Mr. HARGEDON. He may have fifteen if he wants to.

The COURT. I will give you 30. Do you want 30?

Mr. MAGUIRE. No, I will take 15.

(Defendant ordered to recognize in $1000 without security.)

---

5 IN UNITED STATES DISTRICT COURT

(Title Omitted)

Motion to Dismiss

Filed November 23, 1951

The defendants move that the indictment be dismissed on the following grounds:

(1) That the indictment was not found within six (6) years next after the alleged offense was committed.

(2) That the indictment is duplicitous in that it charges violation of Title 26, USC Section 145(b) and Title 18, USC Section 1001.

(3) That the indictment does not state an offense within the terms of Title 26, USC Section 145(b).

By their attorney,

/s/ RICHARD MAGUIRE

Affidavit of Service

(Omitted in printing)

---

6 IN UNITED STATES DISTRICT COURT

Minute Entry

On December 4, 1951, the matter came before the court (McCarthy, J.) on the defendant's Motion to Dismiss. After hearing, the matter was taken under advisement.

9 IN UNITED STATES DISTRICT COURT

(Title Omitted)

Notice of Appeal

Filed February 7, 1952

The United States hereby appeals to the Supreme Court of the United States from the order of the United States District Court for the District of Massachusetts, entered January 10, 1952, dismissing the indictment against the defendants, which charge them with a violation of Section 145(b) of the Internal Revenue Code, which imposes criminal penalties against anyone who wilfully attempts to defeat and evade taxes imposed by Chapter 1 of the Internal Revenue Code relating to taxes on income of individuals and corporations.

FEBRUARY, 1952.

/s/ Philip B. Perlman
PHILIP B. PERLMAN,
Solicitor General.

/s/George F. Garrity
GEORGE F. GARRITY
United States Attorney

/s/ Harold G. Jackson
HAROLD G. JACKSON
Assistant U. S. Attorney

(MEMORANDUM: Counsel were furnished with copies of Notice of Appeal JOHN A. CANAVAN, Clerk)

10 IN UNITED STATES DISTRICT COURT

UNITED STATES OF AMERICA

v.

BEACON BRASS CO., INC., and MAURICE FEINBERG
Criminal No. 51-288

Memorandum

January 10, 1952

McCARTHY, *D. J.:*

The defendants have filed a motion to dismiss the indictment because it is duplicitous and because it does not state an offense within the terms of Title 26, U. S. C. A., § 145(b).

A similar indictment was dismissed on motion by this Court on April 27, 1951 (Criminal No. 51-55). I quote from the memorandum filed on that date: "The return of the Beacon Brass Company, Inc., for the fiscal year ending October 31, 1944, was filed with and received by the Collector of Internal Revenue in Boston, Massachusetts, on either January 5 or January 15, 1945. The stamp of the receiving office, which appears to be indistinct, reads 'January 5, 1945'. But since the check of the Beacon Brass Co., Inc., in payment of its reported tax was dated January 15, 1945, I would find as a fact if it were important (which it is not), that the return was filed on January 15, 1945. The six-year statute of limitations against the filing of a false return in violation of 26 U. S. C. A., § 145(b) commenced to run on that date. The
11 indictment in this case was not returned by the Grand Jury until March 16, 1951, which is well over the six-year period * * *. The present indictment in one count * * * (charges) a violation of 26 U. S. C. A., § 145(b), *plus the making of false statements at a hearing and conference before the representatives and employees of the United States Treasury Department on October 24, 1945.* This is bad pleading. *If the United States wanted to allege a violation of 18 U. S. C. A., (1940 ed.) § 80, (18 U. S. C. A., § 1001, 1948 ed.)*, for the making of false statements, it should have set it forth succinctly in the language of the statute * * *" (Emphasis supplied.)

The indictment with which we are here concerned was returned on September 14, 1951, charging the defendants with violation of 26 U. S. C. A. § 145(b) in that the individual defendant made fraudulent statements on October 24, 1945 to Treasury Agents concerning payments and disbursements by the corporate defendant for the purpose of concealing additional unreported income. The only difference, therefore, between this indictment and the

indictment in Criminal No. 51-55 in this Court is that no mention is made here by the Government of the fact that the corporation filed its tax return in January of 1945.

This indictment does not charge that the defendants violated 18 U. S. C. A., § 1001. A prosecution in 1951 under this statute for a false statement in 1945 would be barred by the three-year statute of limitations. The Government contends, however, that the act of making fraudulent representations to a Treasury Agent to
12 "support and bolster a fraudulent return" is in and of itself a violation of 26 U. S. C. A., § 145(b) which forbids evasion of income tax "in any manner", and to which the six-year statute of limitations is applicable.

Section 145(b) of Title 26, U. S. C. A., contemplates that many methods can be used to accomplish the crime of tax evasion. On the other hand, Section 1001 of Title 18 deals specifically with a situation such as is presented here. In passing the latter statute Congress must be presumed to have intended that making false statements should be punished thereunder. There is a different penalty provided than under 26 U. S. C. A. § 145(b), and Congress thereby emphasized the distinctness of the two offenses. *Creel v. United States*, 8 Cir., 21 F. 2d 690, 691.

The Court concludes that the act alleged in this indictment is not such an act as was contemplated by the provisions of 26 U. S. C. A. § 145(b), and that the indictment, therefore, must be and it is hereby dismissed.

---

17 IN UNITED STATES DISTRICT COURT

(Title Omitted)

Designation of the United States of America of Contents of Record on Appeal

Filed February 11, 1952

The United States of America hereby designates the following portions of the record, proceedings and evidence to be contained in the record on appeal to the Supreme Court of the United States in the above case:

1. Indictment
2. Plea
3. Motion to Dismiss
4. Memorandum of District Judge William T. McCarthy dated January 10, 1952, dismissing the indictment.
5. Order of Judge William T. McCarthy dismissing the indictment against the defendants

6. Docket entries
7. Notice of Appeal
8. Statement as to Jurisdiction
9. Notification to appellees of appeal
10. Designation of record on appeal

GEORGE F. GARRITY
United States Attorney

By: /s/ Harold G. Jackson
HAROLD G. JACKSON
Assistant U. S. Attorney

Certificate of Service

(Omitted in printing)

18 (MEMORANDUM: The following record in Criminal No. 51-55, The United States of America v. Beacon Brass Co., Inc. and Maurice Feinberg, was designated by the defendant to be included as additional portions of the record on appeal.

JOHN A. CANAVAN, Clerk)

19 IN UNITED STATES DISTRICT COURT

Indictment

Filed March 16, 1951

At a District Court of the United States of America, for the District of Massachusetts, begun and holden at Boston, within and for said District, on the third Monday of September in the year of our Lord one thousand nine hundred and fifty.

The JURORS for the United States of America, within and for the District of Massachusetts, upon their oath, charge that on or about October 24, 1945, and thereafter, at Boston, in the District of Massachusetts, and within the jurisdiction of this Court, BEACON BRASS CO., INC., a body corporate, with an usual place of business in Waltham, in said District, and MAURICE FEINBERG, of Brookline, in said District, president and treasurer of said corporation, hereinafter called the defendants, did wilfully and knowingly attempt to defeat and evade a large part of the taxes due and owing by the said Corporation to the United States of America for the fiscal period ending October 31, 1944, by making certain false and fraudulent statements and representations, at a hearing and conference before representatives and employees of the United States Treasury Department, on October 24, 1945, and on other occasions thereafter, concerning payments and disbursements made

by the said Beacon Brass Co., Inc., for the purpose of supporting, ratifying, confirming and concealing the fraudulent and incorrect statements and representations made in the corporate tax return of said Beacon Brass Co., Inc., for the fiscal period ending October 31, 1944, filed on or about January 5, 1945, wherein the defendants alleged that the net income of the corporate defendant for the said fiscal period was the sum of Four Thousand Three Hundred Sixty-Two Dollars and Twenty-Nine Cents, ($4,362.29), and that the total amount of tax due thereon was the sum of One Thousand Ninety Dollars and Fifty-Seven Cents, ($1,090.57), whereas, as said defendants then and there well knew, the net income of said corporation was the sum of One Hundred Sixty-Five Thousand Seven Hundred Sixty-Eight Dollars and Seventy Cents, ($165,768.70), upon which net income the corporation owed to the United States of America, a total tax of One Hundred Thirty-Six Thousand One Dollars and Twenty-Five Cents, ($136,001.25); in violation of Title 26, Section 145(b), United States Code.

A True Bill.

/s/ J. ERNEST GWILLIAM
Foreman of the Grand Jury

/s/ JOSEPH M. HARGEDON
Asst. United States Attorney for the
District of Massachusetts.

DISTRICT OF MASSACHUSETTS,

March 16, 1951

Returned into the District Court by the Grand Jurors and filed

s/ JOHN F. DAVIS
Deputy Clerk.

(File Endorsement Omitted)

IN UNITED STATES DISTRICT COURT

(Title Omitted)

Transcript of Hearing on Arraignment

March 29, 1951

APPEARANCES: Joseph M. Hargedon, Esq., for the Government.
Richard Maguire, Esq., for the Defendant.

The CLERK. 51-54 and 51-55, United States v. Maurice Feinberg and Beacon Brass Company, Inc.

Mr. MAGUIRE. I have a power of attorney I would like to file.

Mr. HARGEDON. I rather doubt that a power of attorney is necessary here. This man owns all the stock of the corporation and I don't believe it is necessary to file a power of attorney.

The CLERK. Maurice Feinberg, these indictments charge you with violation of the income tax law. What say you to 51-54, guilty or not guilty?

Defendant FEINBERG. Not guilty.

The CLERK. And to 51-55?

Defendant FEINBERG. Not guilty.

The COURT. Is a plea of not guilty to be entered for the corporation?

Mr. MAGUIRE. Yes. If your Honor please, there is a previous indictment on which I think your Honor allowed 21 days for special pleas and I wondered if on these indictments I might have 20 days. There are some unusual features.

The COURT. That is all right.

The CLERK. Maurice Feinberg, the Court orders that you recognize on indictment 51-54 in the sum of $1,000 without security for your appearance here in obedience to all orders and directions of the Court until this indictment against you is disposed of. In default thereof you stand committed.

---

23 IN UNITED STATES DISTRICT COURT

(Title Omitted)

Motion to Dismiss

Filed April 6, 1951

The defendants move that the indictment be dismissed on the following grounds:

(1) That the indictment was not found within six (6) years next after the alleged offense was committed.

(2) That the indictment is duplicitous in that it charges violation of 26 USC Section 145 (b) and Title 18 USC Section 80.

By their attorney,

/s/ RICHARD MAGUIRE

Affidavit of Service

(Omitted in printing.)

---

24 IN UNITED STATES DISTRICT COURT

Minute Entry

On April 23, 1951, the Motion to Dismiss came before the court (Sweeney, J.) and after hearing, was taken under advisement.

25 IN UNITED STATES DISTRICT COURT

(Title Omitted)

Order

April 27, 1951

SWEENEY, *Ch. J.* After hearing on the Motion to Dismiss filed by the defendants, and in accordance with the Memorandum handed down this day, it is

ORDERED that the Indictment be, and it hereby is, dismissed.

By the Court,

Deputy Clerk

/s/ G C SWEENEY
4-27-51

---

26 IN UNITED STATES DISTRICT COURT

UNITED STATES OF AMERICA

v.

BEACON BRASS CO., INC.

and

MAURICE FEINBERG

Criminal No. 51-55

Memorandum

April 27, 1951

SWEENEY, *Ch. J.* The defendant has filed a motion to dismiss because the indictment is duplicitous. The facts are as follows:

The return of the Beacon Brass Company, Inc., for the fiscal year ending October 31, 1944, was filed with and received by the Collector of Internal Revenue in Boston, Massachusetts, on either January 5 or January 15, 1945. The stamp of the receiving office, which appears to be indistinct, reads "January 5, 1945". But since the check of the Beacon Brass Co., Inc., in payment of its reported tax was dated January 15, 1945, I would find as a fact if it were important (which it is not), that the return was filed on January 15, 1945. The six-year statute of limitations against the filing of a false return in violation of 26 U.S.C.A., § 145 (b) commenced to run on that date. The indictment in this case was not returned by the Grand Jury until March 16, 1951, which is well over the six-year period. Another indictment, No. 51-54, for the evasion of the above statute has been dismissed by the Court when the United States was put to its election.

The present indictment in one count seeks to revive the action by charging a violation of 26 U.S.C.A., § 145 (b), plus the making of false statements at a hearing and conference before the representatives and employees of the United States Treasury Department on October 24, 1945. This is bad pleading. If the United States wanted to allege a violation of 18 U.S.C.A., (1940 ed.) § 80, (18 U.S.C.A., § 1001, 1948 ed.), for the making of false statements, it should have set it forth succinctly in the language of the statute. The statute of limitations having run, the action could not be revived by the mere charge of subsequent false statements.

This indictment is dismissed.

IN UNITED STATES DISTRICT COURT

(Title Omitted)

Notice of Appeal

Filed May 28, 1951

Now comes the plaintiff, the United States of America, by George F. Garrity, United States Attorney for the District of Massachusetts, by Thomas P. O'Connor, Assistant United States Attorney, in the above-entitled matter and appeals to the Court of Appeals for the First Circuit from the decision and Order of the District Court heretofore entered in the above matter on April 27, 1951 dismissing the indictment, which indictment charges the defendants with violation of Title 26, United States Code, Section 145(b).

GEORGE F. GARRITY
United States Attorney

By: /s/ THOMAS P. O'CONNOR
Assistant U.S. Attorney

IN UNITED STATES DISTRICT COURT

(Title Omitted)

Designation of the United States Government of Contents of of Record on Appeal

Filed June 11, 1951

The United States of America designates the following portions of the record and proceedings to be quoted in the record on appeal:

1. Indictment
2. Plea
3. Motion to Dismiss

4. Memorandum of decision by Judge George C. Sweeney
5. Order of Judge Sweeney dismissing indictment against the defendants
6. Statement of Points
7. Designation

GEORGE F. GARRITY
United States Attorney
By: /s/ Joseph M. Hargedon
JOSEPH M. HARGEDON
Assistant U.S. Attorney

Certificate of Service

(Omitted in printing)

---

30 IN UNITED STATES DISTRICT COURT
(Title Omitted)

Stipulation

Filed June 29, 1951

In the above-entitled case, it is stipulated between the parties that the appeal heretofore entered in said case is waived and withdrawn and the action discontinued.

UNITED STATES OF AMERICA
By:
GEORGE F. GARRITY
United States Attorney
By: /s/ Joseph M. Hargedon
JOSEPH M. HARGEDON
Assistant U.S. Attorney
BEACON BRASS CO., INC.,
and
MAURICE FEINBERG
By their attorney
/s/ Richard Maguire

July 2-51
APPROVED:
/s/ F J W F
U.S. District Judge

(MEMORANDUM: The foregoing Stipulation dismissing the appeal was approved by Judge Ford on July 2, 1951)

JOHN A. CANAVAN, Clerk.

(CLERK'S CERTIFICATE to foregoing transcript omitted in printing)

32 IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

(Title Omitted)

Statement of Points to Be Relied Upon and Designation of Record

Filed March 27, 1952

Pursuant to Rule 13, Paragraph 9, of this Court, appellant states that it intends to rely upon the following points:

1. The District Court erred in holding that the indictment charging that the defendants made fraudulent statements on October 24, 1945, to Treasury Agents, concerning payments and disbursements by the corporate defendant, for the purpose of concealing additional unreported income, in violation of Section 145(b), Internal Revenue Code, did not allege an act contemplated by that statute as a manner of attempted tax evasion.

2. The District Court erred in holding that Congress must be presumed to have intended that the making of false statements such as that alleged in the indictment in this case should be punished under Section 35 of the Criminal Code, 18 U. S. C. (1946 ed.) 80; now 18 U. S. C. (Supp. IV) 1001.

3. The District Court erred in granting the motion to dismiss the indictment.

Appellant deems the entire record as filed in the above-entitled case, with the exception of that portion which relates to a prior indictment of appellees (Criminal No. 51-55 in the court below), to be necessary for consideration of the points relied upon.

PHILIP B. PERLMAN,
Solicitor General.

MARCH 27, 1952.

(FILE ENDORSEMENT OMITTED)

34 IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951

(Title Omitted)

Designation of Additional Parts of the Record

Filed April 10, 1952

Appellee deems the entire record relating to a prior indictment, Criminal No. 51-55 in the court below, necessary for consideration of the points relied upon.

RICHARD MAGUIRE
Attorney for Appellee

(FILE ENDORSEMENT OMITTED)

---

36 SUPREME COURT OF THE UNITED STATES

NO. 662, OCTOBER TERM, 1951

(Title Omitted)

Order Noting Probable Jurisdiction

Filed April 21, 1952.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

☆ U.S. GOVERNMENT PRINTING OFFICE 1952—214757/P.O.39

LIBRARY
SUPREME COURT, U.S.

No. ~~662~~ 30

Office - Supreme Court, U.S.
FILED
MAR 19 1952
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1951

THE UNITED STATES OF AMERICA, APPELLANT

vs.

BEACON BRASS CO., INC., AND MAURICE FEINBERG

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

STATEMENT AS TO JURISDICTION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

No. 51-288 Cr.

UNITED STATES OF AMERICA

v.

BEACON BRASS CO., INC., AND MAURICE FEINBERG

STATEMENT AS TO JURISDICTION

(Filed February 7, 1952)

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, and Rule 37(a) of the Federal Rules of Criminal Procedure, the United States submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the order of the District Court in this cause dismissing the indictment.

OPINION BELOW

The memorandum opinion of the District Court, which states the grounds for dismissing the indictment, has not been reported. A copy thereof is attached hereto as an Appendix.

JURISDICTION

The order of the District Court dismissing the indictment was entered on January 10, 1952. The jurisdiction of the Supreme Court to review on direct appeal an order of a District Court dismissing an indictment, where such dismissal is based on the construction of the statute upon which the indictment or Information is founded, is conferred by the Criminal Appeals Act, 18 U. S. C. 3731. See also Rule 37(a)(2), F. R. Crim. P. The following decision sustains the jurisdiction of this Court: *United States* v. *Gilliland*, 312 U. S. 86, 89.

QUESTION PRESENTED

Whether Section 145(b) of the Internal Revenue Code, punishing an attempt in any manner to willfully evade or defeat the payment of taxes, embraces false statements made to that end, notwithstanding that Section 35 of the Criminal Code makes the giving of false statements in any matter affecting a government agency independently criminal.

STATUTES INVOLVED

INTERNAL REVENUE CODE:

Sec. 145. Penalties.

* * * * *

(b) Failure to Collect and Pay over Tax, or Attempt to Defeat or Evade Tax.—Any person required under this chapter to collect, account for, and pay over any tax imposed by

this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

(26 U. S. C. (1946 ed.) Sec. 145.)

CRIMINAL CODE:

Sec. 35, as amended by the Act of April 4, 1938, 52 Stat. 197.

(A) . . whoever shall knowingly and willfully . . . . make or cause to be made any false or fraudulent statements or representations, ... in any matter within the jurisdiction of any department or agency of the United States . . . ., shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

(18 U. S. C. (1946 ed.) Sec. 80; now 18 U. S. C. (Supp. IV) 1001.)

STATEMENT

A one-count indictment was returned, on September 14, 1951, against the defendants, in the United States District Court for the District of Massachusetts, charging that the corporation and Feinberg, its President and Treasurer, willfully attempted to defeat and evade a large part of the

taxes due and owing by the corporation for the fiscal year ending October 31, 1944, by making false and fraudulent statements and representations at a hearing before Treasury Department representatives on October 24, 1945, and on other occasions thereafter, concerning payments and disbursements made by the corporation, for the purpose of concealing additional unreported corporate net income on which a tax of approximately $134,910.68 was due and owing, all in violation of Section 145(b) of the Internal Revenue Code.

The defendants moved to dismiss the indictment, contending that it was duplicitous, and that it did not state an offense within the purview of Section 145(b), Internal Revenue Code.

The District Court held that the indictment did not charge an offense under Section 145(b) of the Internal Revenue Code, but rather an offense under Section 35(A) of the Criminal Code (18 U. S. C. (1946 ed.) 80, now 18 U. S. C. (Supp. IV) 1001)[1] which makes it an offense to make false statements or representations within the jurisdiction of any department or agency of the United States. The six-year statute of limitations applicable to offenses under Section 145(b) had not run when the indictment was returned, but the indict-

[1] Section 35(A) of the Criminal Code was repealed by Section 21 of the Act of June 25, 1948, 62 Stat. 683, 862, which codified into positive law Title 18 of the United States Code. The substance of Section 35(A) now appears in 18 U.S.C. (Supp. IV) 1001.

ment showed on its face that the three-year limitation period applicable to Section 35(A) of the Criminal Code had fully expired. In explanation of its holding, the District Court stated, in effect, that Section 145(b) of the Internal Revenue Code contemplates that many methods can be used to accomplish the crime of tax evasion, while Section 35(A) of the Criminal Code deals specifically with false statements and representations, and that Congress must be presumed to have intended that the making of false statements and representations should be punished under Section 35(A) rather than under Section 145(b). The court then dismissed the indictment on the ground that it did not charge an offense under Section 145(b).

THE QUESTION IS SUBSTANTIAL

The issue presented in this appeal is one of obvious importance in the administration of the federal income tax laws, for the effect of the decision of the District Court is to create two distinct statutory periods of limitation for offenses involving attempts to evade and defeat the payment of taxes. By construing Section 145(b) of the Internal Revenue Code to exclude the tax evasion case at bar, the court has removed cases of that class from the ambit of the six-year statute of limitations (26 U. S. C. 3748(a)(3) and has placed them under the general three-year statute, although Congress has expressly provided that the six-year statute shall apply to offenses involving willful attempts to

evade and defeat the payment of taxes. Indeed, if the decision of the District Court is permitted to stand, the Government will be faced with another dual statutory difficulty in tax evasion cases, for if a false representation with respect to income in a tax evasion matter is an offense separate and distinct from the offense of attempting to evade and defeat payment of the tax, a serious question will undoubtedly arise as to whether pertinent false statements and representations may be used as evidence in a Section 145(b) case which involves other elements of evasion.

Section 145(b) in sweeping terms makes it an offense to attempt to evade or defeat "in any manner" the payment of a tax. Thus, in *Spies* v. *United States*, 317 U. S. 492, 499, this Court said:

> Congress did not define or limit the methods by which a willful attempt to defeat and evade might be accomplished and perhaps did not define lest its effort to do so result in some unexpected limitation. Nor would we by definition constrict the scope of the Congressional provision that it may be accomplished "in any manner." By way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of

> the kind, and any conduct, the likely effect of which would be to mislead or to conceal. If the tax-evasion motive plays any part in such conduct the offense may be made out * * *.

The language of Section 145(b), on its face and as thus construed, is plainly broad enough to encompass false statements and representations willfully made to Treasury representatives for the purpose of evading or defeating the payment of a tax.

The fact that there is another penal statute (Section 35(A)) of the Criminal Code (now 18 U. S. C. (Supp. IV) 1001) directed at false statements with respect to any matter within the jurisdiction of any federal department or agency does not affect the breadth of Section 145(b). The offense of attempting to evade or defeat the payment of a tax plainly contains elements different from the offense of making a general false statement or representation within the jurisdiction of a department or agency of the United States under Section 35(A) of the Criminal Code, and different evidence is required to sustain it.

The rule underlying the Government's construction of the statute has long had the approval of this Court. *Edgington* v. *United States*, 164 U. S. 361, 363; *Gavieres* v. *United States*, 220 U. S. 338, 345; *Morgan* v. *Devine*, 237 U. S. 632, 637-641; *Albrecht* v. *United States*, 273 U. S. 1, 11-12; *United States* v. *Noveck*, 273 U. S. 202, 206. In *United States* v.

Gilliland, 312 U. S. 86, 95, this Court held that Section 35 of the Criminal Code was but a "fitting complement" to the so-called "Hot Oil" Act of February 22, 1935, 49 Stat. 30, 31. And in *Edwards v. United States*, 312 U. S. 473, 483-484, this Court held that the Securities Act of 1933, making it unlawful to use the mails to defraud by the sale of securities, and the general mail fraud statute "can exist and be useful, side by side." Cf. *United States* v. *Borden Company*, 308 U. S. 188, 198, 199.

The lower courts have likewise held that offenses created by different statutes, which arise out of the same acts, are to be considered separate offenses if they contain different elements and require different evidence to sustain them, and that such statutes may stand together. *Gaunt* v. *United States*, 184 F. 2d 284 (C.A. 1), certiorari denied, 340 U. S. 917, 939; *Capone* v. *United States*, 51 F. 2d 609, 615 (C.A. 7), certiorari denied, 284 U. S. 669; *O'Brien* v. *United States*, 51 F. 2d 193, 196 (C.A. 7), certiorari denied, 284 U. S. 673; *Levin* v. *United States*, 5 F. 2d 598, 599-600 (C.A. 9), certiorari denied, 269 U. S. 562; *Steinberg* v. *United States*, 14 F. 2d 564 (C.A. 2); *Bartlett* v. *United States*, 166 F. 2d 920, 926-927 (C.A. 10); *Ex parte Berkoff*, 65 F. Supp. 976 (D.C. Minn.).

In the case at bar, it is beyond reasonable argument that the willful intent to evade and defeat a tax required to create an offense under Section

145(b) of the Internal Revenue Code is different from any of the elements required to create an offense under Section 35(A) of the Criminal Code, and the evidence required to sustain a conviction under Section 145(b) is necessarily different.

It is submitted that the decision of the District Court is erroneous and that the question presented by this appeal is a substantial one which should be settled by the Supreme Court.

Respectfully submitted,

(S.) PHILIP B. PERLMAN,
Solicitor General.

(S.) GEORGE F. GARRITY,
United States Attorney.

(S.) HAROLD G. JACKSON,
Assistant U. S. Attorney.

APPENDIX

UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS

Criminal No. 51-288

UNITED STATES OF AMERICA

v.

BEACON BRASS CO., INC. AND MAURICE FEINBERG

MEMORANDUM—January 10, 1952

McCARTHY, *D. J.*:

The defendants have filed a motion to dismiss the indictment because it is duplicitous and because it does not state an offense within the terms of Title 26, U. S. C. A., § 145(b).

A similar indictment was dismissed on motion by this Court on April 27, 1951 (Criminal No. 51-55). I quote from the memorandum filed on that date: "The return of the Beacon Brass Company, Inc., for the fiscal year ending October 31, 1944, was filed with and received by the Collector of Internal Revenue in Boston, Massachuetts, on either January 5 or January 15, 1945. The stamp of the receiving office, which appears to be indistinct, reads 'January 5, 1945'. But since the check of the Beacon Brass Co., Inc., in payment of its reported tax was dated January 15, 1945, I would find as a fact if it were important (which it is not), that the return was filed on January 15, 1945. The six-year statute of limitations against the filing of a false return in violation of 26 U. S. C. A., § 145(b) commenced to run on that date. The in-

dictment in this case was not returned by the Grand Jury until March 16, 1951, which is well over the six-year period * * *. The present indictment in one count * * * (charges) a violation of 26 U. S. C. A., § 145(b), *plus the making of false statements at a hearing and conference before the representatives and employees of the United States Treasury Department on October 24, 1945.* This is bad pleading. *If the United States wanted to allege a violation of 18 U. S. C. A., (1940 ed.) § 80; (18 U. S. C. A., §1001, 1948 ed.),* for the making of false statements, it should have set it forth succinctly in the language of the statute * * *" (Emphasis supplied.)

The indictment with which we are here concerned was returned on September 14, 1951, charging the defendants with violation of 26 U. S. C. A. § 145(b) in that the individual defendant made fraudulent statements on October 24, 1945 to Treasury Agents concerning payments and disbursements by the corporate defendant for the purpose of concealing additional unreported income. The only difference, therefore, between this indictment and the indictment in Criminal No. 51-55 in this Court is that no mention is made here by the Government of the fact that the corporation filed its tax return in January of 1945.

This indictment does not charge that the defendants violated 18 U. S. C. A., § 1001. A prosecution in 1951 under this statute for a false statement in 1945 would be barred by the three-year statute of limitations. The Government contends, however, that the act of making fraudulent representations to a Treasury Agent to "support and

bolster a fraudulent return" is in and of itself a violation of 26 U. S. C. A., § 145(b) which forbids evasion of income tax "in any manner", and to which the six-year statute of limitations is applicable.

Section 145(b) of Title 26, U. S. C. A., contemplates that many methods can be used to accomplish the crime of tax evasion. On the other hand, Section 1001 of Title 18 deals specifically with a situation such as is presented here. In passing the latter statute Congress must be presumed to have intended that making false statements should be punished thereunder. There is a different penalty provided than under 26 U. S. C. A. § 145(b), and Congress thereby emphasized the distinctness of the two offenses. *Creel* v. *United States*, 8 Cir., 21 F. 2d 690, 691.

The Court concludes that the act alleged in this indictment is not such an act as was contemplated by the provisions of 26 U. S. C. A. § 145(b), and that the indictment, therefore, must be and it is hereby dismissed.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1952 984764

SUPREME COURT, U.S.

NO. 30

SEP 2 1 1952

CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1952

THE UNITED STATES OF AMERICA, *Appellant*

v.

THE BEACON BRASS CO., INC., and
MAURICE FEINBERG

On Appeal from the United States District Court for the District of Massachusetts

---

BRIEF FOR THE UNITED STATES

INDEX

CITATIONS

CASES:

Page

STATUTES:

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 30

THE UNITED STATES OF AMERICA, *Appellant*

v.

THE BEACON BRASS CO., INC., and MAURICE FEINBERG

On Appeal from the United States District Court for the District of Massachusetts

---

BRIEF FOR THE UNITED STATES

OPINION BELOW

The memorandum opinion of the District Court (R. 5-6) is not reported.

JURISDICTION

The order of the District Court dismissing the indictment was entered on January 10, 1952 (R. 5-6). The United States filed its notice of appeal to this Court on February 7, 1952 (R. 4). The

jurisdiction of this Court to review on direct appeal the order of the District Court dismissing the indictment, where such dismissal is based on a construction of the statute upon which the indictment is founded, is conferred by the Criminal Appeals Act, 18 U.S.C. 3731. See also Rule 37(a)(2), F. R. Crim. P. Probable jurisdiction was noted on April 21, 1952 (R. 14).

QUESTION PRESENTED

Whether a willful attempt to evade and defeat taxes by making false and fraudulent statements and representations to representatives of the United States Treasury Department violates Section 145(b) of The Internal Revenue Code, notwithstanding that Section 35 (A) of the Criminal Code punishes willful false statements in any matter within the jurisdiction of a department or agency of the United States.

STATUTES INVOLVED

Section 145 (b) of the Internal Revenue Code (26 U.S.C. 145(b)) provides:

> Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the pay-

ment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

Section 35 (A) of the Criminal Code (18 U.S.C. (1946 ed.) 80; now 18 U.S.C. 1001) provided, in pertinent part:

> * * * whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States * * *, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

STATEMENT

On September 14, 1951, a one-count indictment was returned against the appellees, Beacon Brass Company, a corporation, and Maurice Feinberg, its president and treasurer, in the United States

District Court for the District of Massachusetts. The indictment charged that, in violation of Section 145 (b) of the Internal Revenue Code (*supra*, pp. 2-3), the appellees had willfully attempted to defeat and evade a large part of the taxes due and owing by the corporation for the fiscal period ending October 31, 1944, by making false and fraudulent statements and representations at a hearing before Treasury Department representatives on October 24, 1945, and on other occasions thereafter, concerning payments and disbursements made by the corporation, for the purpose of concealing additional unreported corporate net income on which a tax of approximately $134,910.68 was due and owing (R. 2). On motion of the appellees (R. 3), the District Court dismissed the indictment (R. 5-6).[1]

The dismissal of the indictment was based upon the District Court's holding that the conduct alleged in the indictment "is not such an act as was contemplated" by Section 145 (b) of the Internal Revenue Code (R. 6). This holding was required, the court reasoned, because Section

[1] The district court proceedings in this case, which was docketed as Criminal No. 51-288 in the court below, appear in the printed record before this Court at pp. 1-7, 13-14. Pursuant to designation by the appellees (R. 7, 14), the entire record relating to their previous indictment in Criminal No. 51-55 in the court below has been transmitted to this Court and appears in the printed record at pp. 7-12. The Government considers these latter materials unnecessary for consideration of the points relied upon (R. 13).

35 (A) of the Criminal Code (18 U.S.C. (1946 ed.) 80; now 18 U.S.C. 1001)[2] made it an offense willfully to make false statements or representations in any matter within the jurisdiction of any department or agency of the United States. Although conceding that Section 145 (b) of the Internal Revenue Code contemplates that many methods can be used to accomplish the crime of tax evasion, the District Court thought that Section 35 (A) of the Criminal Code "deals specifically with a situation such as is presented here" and that, therefore, "Congress must be presumed to have intended that making false statements should be punished thereunder." (R. 6.)[3]

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred:

1. In holding that the indictment does not charge an offense under Section 145(b) of the Internal Revenue Code.

---

[2] Section 35 (A) of the Criminal Code was repealed by Section 21 of the Act of June 25, 1948, c. 645, 62 Stat. 683, 862, which codified into positive law Title 18 of the United States Code. The substance of Section 35 (A) now appears in 18 U.S.C. 1001, but we shall refer here to the former provision since it was in effect at the time of the events giving rise to this prosecution.

[3] The six-year statute of limitations (26 U.S.C. 3748(a)(2)) applicable to offenses under Section 145(b) of the Internal Revenue Code had not run when the indictment was returned, but the indictment showed on its face that the three-year limitation period (18 U.S.C. 3282) applicable to Section 35 (A) of the Criminal Code had expired.

2. In holding that the making of false statements such as those alleged in the indictment can be punished only under Section 35 (A) of the Criminal Code.

3. In granting the motion to dismiss the indictment.

SUMMARY OF ARGUMENT

A. The broad language of Section 145(b) of the Internal Revenue Code, imposing criminal sanctions upon "any person who willfully attempts in any manner to evade or defeat" any income tax, plainly reaches attempts to evade or defeat by means of false statements. Misrepresentation or concealment is ordinarily the essence of the offense, and false statements are the most common and obvious means to such criminal ends. Recognizing these simple realities, the courts of appeals have uniformly held that a willful attempted evasion by means of false statements in a tax return constitutes an offense within Section 145(b). And this conclusion has at least twice been implicit in decisions of this Court.

If the uniform holdings that false written statements may be used to violate Section 145(b) are correct, the same rule necessarily applies to false oral statements. There is no basis in the statutory language for distinguishing the two, and the holding of the District Court in this case applies equally to both.

B. Because Section 35(A) of the Criminal Code forbade false statements "in any matter within the jurisdiction of any department or agency of the United States," the District Court concluded that false statements willfully made for the purpose of evading taxes could not be punished under Section 145(b) of the Internal Revenue Code. This reasoning is fallacious. It affords no basis for excluding from the coverage of Section 145(b) conduct to which the statutory terms plainly apply.

It commonly happens that a single act or transaction offends against two criminal statutes. But, at least where the statutes define distinct offenses in the sense that there are differences in the proof they require for conviction, they remain fully effective in accordance with their terms. In such circumstances, neither statute is to be regarded as having been repealed by implication and there is no presumption favoring a restrictive interpretation of either to eliminate cases where both may apply.

These settled principles control here. Section 145(b) strikes at willfully attempted tax evasion while Section 35(A) is directed to false statements in general. The fact that a particular false statement made in an attempt to evade taxes may be punishable under Section 35(A) is no ground for denying that such a statement falls within the broad prohibition of Section 145(b) against attempts to evade taxes "in any manner."

The District Court's error is vividly demonstrated by decisions rejecting the argument that Section 145(b) repealed by implication Section 35(A) or other statutes punishing false statements. These decisions accept without question the obvious proposition that false statements made with intent to evade taxes may offend against both Section 145(b) and other statutes punishing false statements as such. They show that this coincidence is neither uncommon nor improper and that it affords no ground for judicial redefinition of any of the distinct offenses Congress has proscribed.

ARGUMENT

Section 145(b) of the Internal Revenue Code Embraces Willful Attempts to Evade or Defeat Taxes by Making False and Fraudulent Statements and Representations to Representatives of the Treasury Department, Notwithstanding That Section 35(A) of the Criminal Code Forbids Willful False Statements in Any Matter Within the Jurisdiction of a Department or Agency of the United States

A. The Plain Language of Section 145(b), as Uniformly Construed by the Courts, Reaches Attempts to Evade or Defeat by False Statements

In sweeping terms, Section 145(b) of the Internal Revenue Code (*supra*, pp. 2-3) denounces as a felon "any person who willfully attempts *in any manner* to evade or defeat any tax imposed" by the income tax provisions. (Emphasis added.) Examining the "comprehensive violation" (*United States* v. *Johnson*, 319 U. S. 503, 515)

against which this language is directed, this Court said (in *Spies* v. *United States,* 317 U. S. 492, 499):

> Congress did not define or limit the methods by which a willful attempt to defeat and evade might be accomplished and perhaps did not define lest its effort to do so result in some unexpected limitation. Nor would we by definition constrict the scope of the Congressional provision that it may be accomplished "in any manner." By way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, *and any conduct, the likely effect of which would be to mislead or to conceal.* If the tax-evasion motive plays any part in such conduct the offense may be made out * * *. [Emphasis added.]

The language of Section 145(b), on its face and as thus construed, is plainly broad enough to encompass false statements and representations wilfully made to Treasury representatives for the

purpose of evading or defeating the payment of a tax.

In a tax-collecting system which, despite recent importation of the withholding device, continues to rely "largely upon the taxpayer's own disclosures" (*Spies* v. *United States, supra,* at 495; see also *United States* v. *Murdock,* 290 U. S. 389, 395-396), the most obvious "manner" in which evasion or defeat is likely to be attempted is false statement to the Treasury of the facts upon which the tax is based. Cf. *Rick* v. *United States,* 161 F. 2d 897, 898 (C. A. D. C.). This plain fact is highlighted in this Court's *Spies* opinion by the examples given (*supra,* p. 9), "[b]y way of illustration, and not by way of limitation," to show the varieties of conduct from which a violation of Section 145(b) might be inferred. Ultimately, in each of these illustrations, the essence of the wrongful attempt lies in misrepresentations of fact to the taxing officials. Thus, "keeping a double set of books, making false entries or alterations, or false invoices or documents" would not fall under Section 145(b) were their purpose anything other than "to mislead or to conceal." Such books or entries or documents become important precisely because they are employed, in the language of the indictment now before the Court (R. 2), as "false and fraudulent statements and representations * * * [to] representatives and employees of the United States Treasury Depart-

ment * * *." Cf. *Steinberg* v. *United States*, 14 F. 2d 564, 567 (C. A. 2).

Recognizing that false statements to Treasury representatives constitute the likeliest and most direct means of violation, the courts of appeals in practically every circuit have held that Section 145(b) covers willful attempts to evade and defeat taxes by the filing of false returns—*i. e.*, by the making of false statements in writing. *Guzik* v. *United States*, 54 F. 2d 618 (C. A. 7), certiorari denied, 285 U. S. 545; *United States* v. *Schenck*, 126 F. 2d 702 (C. A. 2), certiorari denied, *sub nom. Moskowitz* v. *United States*, 316 U. S. 705; *Rose* v. *United States*, 128 F. 2d 622 (C. A. 10), certiorari denied, 317 U. S. 651; *Cave* v. *United States*, 159 F. 2d 464 (C. A. 8), certiorari denied, 331 U. S. 847; *Barrow* v. *United States*, 171 F. 2d 286 (C. A. 5); *Emmich* v. *United States*, 298 Fed. 5, 9 (C. A. 6); *Myres* v. *United States*, 174 F. 2d 329 (C. A. 8), certiorari denied, 338 U. S. 849; *United States* v. *Croessant*, 178 F. 2d 96 (C. A. 3), certiorari denied, 339 U. S. 927; *Taylor* v. *United States*, 179 F. 2d 640 (C. A. 9);[4] *Gaunt* v.

---

[4] In *Taylor* v. *United States*, *supra*, reversal of a conviction under Section 145(b) was sought on the ground that "26 U. S. C. A. § 3616, (which makes it a misdemeanor to deliver or disclose to the collector 'any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made * * *') repealed by implication § 145(b) insofar as the latter section might be construed to prohibit the evasion of income

United States, 184 F. 2d 284 (C. A. 1), certiorari denied, 340 U. S. 917. And while the narrow question now presented has never been before this Court in the exact form it takes here, prior decisions of the Court have implicitly held that false statements in a return could be one of the many ways of making the attempt at evasion proscribed by Section 145(b).[5]

---

taxes by filing false returns." Disposing of this contention (179 F. 2d at 643-644), the Court said:

> The legislative history of the two sections reveals that § 3616 was originally enacted long prior to the enactment of § 145(b). [§ 3616 was derived from R. S. § 3179, which revised Section 15 of the Act of June 30, 1864, 13 Stat. 218, 227, and thus antedates by a considerable period the income tax provisions to which § 145 relates.] It goes without saying that an existing statute cannot repeal, by implication or otherwise, a subsequent enactment. Both of these sections were re-enacted in the 1939 general codification of the Internal Revenue Code, 53 Stat. 62, 440. We further note that the penalties provided in § 145(b) are made expressly "in addition to other penalties provided by law."

[5] In the *Spies* case, this Court held that the willful attempt to evade declared in Section 145(b) to be a felony could not be established merely by proof of the willful omissions to file a return and pay a tax, both of which are made misdemeanors under Section 145(a). In the light of this gradation of offenses, the Court concluded that conviction under Section 145 (b) required "some willful commission in addition to the willful omissions that make up the list of misdemeanors." 317 U.S. at 499. In a case like the one here, the test of "affirmative willful attempt" (*ibid.*) is clearly met. Pointing out the obvious distinction between the affirmatively wrongful filing of a return containing false statements and the failure to file any return, the courts of appeals have uniformly construed the *Spies* decision as leaving intact the

United States v. *Troy*, 293 U. S. 58, construing a predecessor statute (Revenue Act of 1928, Sec. 146(b), 45 Stat. 791, 835) identical to the present Section 145(b), held (at p. 62) that in an indictment charging—

> willful effort to defeat the tax by presenting a false return no allegation of duty to make the return was necessary. *The alleged act sufficiently indicated appellee's criminal intent.* Certainly we can find no legislative purpose to exempt from punishment one who actively endeavors to defeat a tax. [Emphasis added.]

In *United States* v. *Noveck*, 273 U. S. 202, in a more common variant of the argument appellees have made here, the taxpayer urged that the provision punishing willful attempts "in any manner" to evade or defeat taxes[6] was so comprehensive that it had to be construed as impliedly

---

settled rule that the felony under Section 145 (b) may be committed by filing a false return. *Cave* v. *United States*, 159 F. 2d 464, 466-467 (C.A. 8), certiorari denied, 331 U.S. 847; *Myres* v. *United States*, 174 F. 2d 329, 334 (C.A. 8), certiorari denied, 338 U.S. 849; *United States* v. *Croessant*, 178 F. 2d 96, 97-98 (C.A. 3), certiorari denied, 339 U.S. 927. *Gaunt* v. *United States*, 184 F. 2d 284, 288 (C.A. 1), 340 U.S. 917. This conclusion is at least equally applicable where, as here, evasion is attempted by false oral statements.

[6] The statute there involved (Revenue Act of 1921, Sec. 253, 42 Stat. 227, 268) contained the pertinent language now found in Section 145(b), but made it a misdemeanor rather than a felony willfully to attempt "in any manner to defeat or evade the tax * * *."

repealing, as to false returns, the general perjury statute. Rejecting this argument, the Court said (273 U. S. at 206-207):

> The crime of attempting to defeat or evade the Revenue Law may be committed without verification of a false tax return. * * * Congress, having power to make both the false swearing and the use of the false affidavit punishable, * * * did so.

We submit, in short, that the long course of judicial decision, uniformly following the plain mandate of the language Congress has repeatedly reenacted,[7] leaves no doubt that false statements

---

[7] Under Section 38 Eighth of the Corporation Excise Tax Act of 1909 (36 Stat. 11, 117) and Section II F of the Income Tax Act of 1913 (38 Stat. 114, 171), it was an offense to make "any false or fraudulent return, or statement, with intent to defeat or evade the assessment * * *." Similar provisions appeared in Section 18 of the Revenue Act of 1916 (39 Stat. 756, 775) and Section 1209 of the Revenue Act of 1917 (40 Stat. 300, 336). Section 253 of the Revenue Act of 1918 (40 Stat. 1057, 1085), introducing the language now found in Section 145(b), declared that anyone "who willfully attempts in any manner to defeat or evade the [income] tax imposed by this title, shall be guilty of a misdemeanor * * *." See also Section 1308(b) of the same Act, 40 Stat. 1143. This misdemeanor provision was reenacted in the Revenue Act of 1921, Section 253 (42 Stat. 227, 268).

In 1924, the felony provision was enacted as Section 1017(b) of the Revenue Act of 1924 (43 Stat. 253, 344) in the language now found in Section 145(b) of the Code, and was carried forward in subsequent Revenue Acts and into the Code. 44 Stat. 9, 116; 45 Stat. 791, 835; 47 Stat. 169, 217; 48 Stat. 680, 725; 49 Stat. 1648, 1703; 52 Stat. 447, 513; 53 Stat. 1, 63.

made in a willful attempt to evade or defeat taxes violate Section 145(b). While the cases have commonly involved false *written* statements—usually in a return—the statutory language is equally applicable to false oral statements made to Treasury agents for the same unlawful purpose. Cf. *United States* v. *Johnson*, 319 U. S. 503, 518.[8] For the problem in every case is whether the conduct charged is such that its "likely effect * * * would be to mislead or to conceal" (*Spies, supra*, at 499), and oral misrepresentations made to Treasury agents with intent to conceal income are obviously as eligible for this description as fraudulent writings.

B. The Fact That Appellees' Conduct May Have Violated Section 35(A) of the Criminal Code Is No Bar to Their Prosecution for the Distinct Offense Under Section 145(b) of the Internal Revenue Code

Apparently recognizing (R. 6) that the broad proscription in Section 145(b) against attempted evasion "in any manner" appears on its face to include attempted evasion by false statements, the District Court nevertheless held that the language must be read as if it said "in any manner, except

[8] The cited passage in the *Johnson* opinion makes it clear that "conduct, acts and admissions," which is designed to aid in the concealment perpetrated by a false return may be found to violate Section 145(b) even where the defendant plays no part in the actual making of the return. Included in the evidence there found sufficient to sustain convictions was proof of false statements to Government agents. See Brief for the United States on Reargument, Oct. T. 1942, Nos. 4 and 5, pp. 72-75.

by means of false statements." Because Section 35(A) of the Criminal Code (18 U. S. C. (1946 ed.) 80, now 18 U. S. C. 1001; *supra*, p. 3) forbade false statements "in any matter within the jurisdiction of any department or agency of the United States," the court reasoned, "Congress must be presumed to have intended that making false statements should be punished thereunder." If this "presumption" were warranted, it would of course apply to written as well as oral false statements, for both are encompassed by Section 35(A). See, *e. g., United States* v. *Gilliland*, 312 U. S. 86. It would mean that a false return employed as a method of willfully attempting to evade taxes could not be punished under Section 145(b), contrary to the consistent holdings of the courts of appeals and the implicit premise of at least two of this Court's prior decisions (see pp. 11-14, *supra*). It would mean, more broadly, that—since misrepresentation is in almost every conceivable case the essence of the offense under Section 145(b) (*supra*, pp. 10-11), and since misrepresentations to Government agents fall within the general provisions of Section 35(A)—the comprehensive language Congress chose in Section 145(b), apparently to avoid any "unexpected limitation" (*Spies, supra*, at 499), would be limited almost to the point of nullification.

But there is neither reason nor authority for the construction adopted by the court below. Every

relevant consideration requires that Section 145(b) be read to mean what it says—that the outlawed attempts may be committed "in any manner." The plain statutory terms, clearly encompassing the method of attempted evasion charged in the present indictment, neither require nor permit exclusion of any particular method because it may happen to be in itself a violation of another statute.

It has long been recognized that a single act or transaction may violate two or more criminal statutes. *E. g., United States* v. *Noveck*, 273 U. S. 202, 206 (perjury and willful attempt to evade taxes), *Carter* v. *McClaughry*, 183 U. S. 365, 395 (conspiracy to defraud and conduct unbecoming an officer under Articles of War); *Gavieres* v. *United States*, 220 U. S. 388 (being drunk, rude, or indecent in public and insulting or threatening a public officer). Where two such statutes define different offenses—*i. e.*, where the facts necessary to conviction under one differ from the facts necessary under the other—there is no occasion for concluding that an implied repeal has been effected or that the plain meaning of either one must be so restricted as to prevent their overlapping. "The two can exist and be useful, side by side." *Edwards* v. *United States*, 312 U. S. 473, 484. See also *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 457; *United States* v. *Gilliland*, 312 U. S. 86, 95-96; *United States* v. *Borden Co.*,

308 U. S. 188, 198; *United States* v. *Noveck, supra; Albrecht* v. *United States*, 273 U. S. 1, 11-12.

These settled principles control here. Directed to the problem of tax evasion, Section 145(b) clearly defines an offense distinct from the general crime of false statements punished by Section 35(A) of the Criminal Code. The crucial fact requiring proof for conviction under the former is a willful effort to evade or defeat taxes—an element which plays no part in Section 35(A). Conversely, a false statement punishable under the latter statute is not essential to conviction for attempted tax evasion, although, as we have pointed out, such a statement is probably the most common device for the commission of this crime. While the District Court emphasized the "distinctness of the two offenses" (R. 6), this factor serves to refute rather than to support its conclusion.[9] For, being distinct, each of the statutes

---

[9] The difference in punishments, to which the District Court referred as pointing up the distinctiveness of the two statutes, has been eliminated. See note 10, *infra*. There remains, in addition to the crucial tax evasion element which is required only under Section 145(b), the difference in limitations provisions which makes it necessary that the present indictment be predicated upon this section. For the offense of attempted tax evasion accomplished "in any manner," Congress has specially provided a six-year period for prosecution. 26 U. S. C. 3748 (a) (2). For the general crime of false statements, the general three-year period applies. 18 U. S. C. 3282. And this difference, we believe, helps to point up the District Court's error. For, in singling

is to be enforced as it was written. The crippling construction adopted by the court below, in the teeth of the plain congressional language and the uniform judicial precedents, finds no justification in the erroneously assumed need to prevent application of Section 145(b) in situations where Section 35(A) could also apply.

The District Court's error is made particularly clear by four decisions, one by this Court and three by the courts of appeals, which have rejected arguments built on essentially the same error. *United States* v. *Noveck, supra; Levin* v. *United States*, 5 F. 2d 598 (C. A. 9), certiorari denied, 269 U. S. 562; *Steinberg* v. *United States*, 14 F. 2d 564 (C. A. 2); *Capone* v. *United States*, 51 F. 2d 609 (C. A. 7), certiorari denied, 284 U. S. 669. In these cases, involving identical predecessors of Section 145(b), it was variously contended that the statute punishing willful attempts in any manner to evade taxes (1) repealed by implication the general perjury statute insofar as that statute would otherwise have applied to a false tax return made under oath; (2) at least, prevented convictions

---

out attempted tax evasion as requiring a longer limitations period, Congress has emphasized the specific treatment of this crime and of the varieties of conduct it encompasses. The District Court, on the other hand, has viewed a false statement made to evade taxes simply as one of the general class of false statements in government matters, ignoring the central problem of tax evasion, and—in a conclusion which does not follow from, but may be related to, this initial error—has decided that attempted evasion through false statements cannot be reached under Section 145(b) at all.

for both perjury and attempted evasion based on the making and filing of a false return; or (3) repealed by implication Section 35(A) of the Criminal Code as applied to false tax returns.[10] The decisions rejecting these arguments are plainly apposite here. They are significant for their unhesitating acceptance of what is, after all, the decisive point here—that Section 145(b) unmistakably reaches attempted evasion by false statements, even though the making of such state-

[10] The District Court does not appear in this case to have suggested that Section 35(A) of the Criminal Code should be read as having repealed Section 145(b) of the Internal Revenue Code by implication. As shown by the decisions under discussion, the chronology of the two provisions requires that this strongly disfavored argument be attempted the other way. The predecessors of Section 145(b), denouncing attempted evasion "in any manner," began with the Revenue Act of 1918 (approved February 24, 1919), and did not provide for punishment as a felony until 1924. See note 7, *supra*. On the other hand, Section 35(A), insofar as it is material here, reached its present form in the Act of October 23, 1918, 40 Stat. 1015. While it does not affect the problem of construction involved here, the fact that, until 1924, the provision which is now Section 145(b) of the Internal Revenue Code punished attempted evasion as a misdemeanor makes obvious the practical reason for the argument that it had repealed the perjury statute by implication. A similar situation existed with respect to Section 35(A) of the Criminal Code which, until the revision of Title 18 in 1948, provided for a maximum of ten years' imprisonment as compared with the maximum of five years under Section 145(b). In the revision, 18 U. S. C. 287 and 1001, into which the former Section 35(A) was divided, were assigned the same five-year and $10,000 maximum penalties as those contained in Section 145(b).

ments is also punishable under another provision. See pp. 12-14, *supra*. They refute the fallacy underlying the District Court's belief that, because false statements are punishable as such, the Congress must be supposed to have excluded them by an unwritten proviso when it outlawed attempts to evade taxes "in any manner."[11] The fact that the method of attempted evasion in this case appears to have transgressed Section 35(A) as well as Section 145(b) would probably preclude a cumulation of punishments under both provisions. See *Capone* v. *United States, supra,* at 615; *Gaunt* v. *United States,* 184 F. 2d 284, 289-290 (C. A. 1), certiorari denied, 340 U. S. 917. But this circumstance affords no ground for the conclusion that courts should or may "by definition constrict the scope of the Congressional provision that [a willful attempt to defeat and evade] may be accomplished 'in any manner.'" *Spies* v. *United States, supra,* at 499.

---

[11] The apparent assumption of the District Court that false statements should be held to be punishable only under Section 35(A) is belied by the numerous instances in which Congress has expressly provided for criminal sanctions against false statements in particular contexts. See, *e. g.*, for a small sampling of such provisions, originally enacted in connection with particular legislative programs, 18 U. S. C. 1003, 1007, 1008, 1010-1012, 1014, 1015. See also *Bartlett* v. *United States,* 166 F. 2d 920 (C. A. 10), rejecting the argument that Section 205(b) of the Emergency Price Control Act of 1942 (56 Stat. 33), punishing false statements in price control matters, superseded Section 35(A) of the Criminal Code.

CONCLUSION

For the reasons stated, the judgment of the District Court dismissing the indictment should be reversed.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General.
CHARLES S. LYON,
Acting Assistant Attorney General.

ELLIS N. SLACK,
MARVIN E. FRANKEL,
MELVA M. GRANEY,
Special Assistants to the Attorney General.

SEPTEMBER, 1952.

☆U.S. GOVERNMENT PRINTING OFFICE 1952—223532/P.O.396

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
OCT 23 1952
HAROLD B. WILLEY, Clerk

No. 30

In the Supreme Court of the United States

OCTOBER TERM, 1952

THE UNITED STATES OF AMERICA, APPELLANT

v.

THE BEACON BRASS CO., INC., AND MAURICE FEINBERG

REPLY BRIEF FOR THE UNITED STATES

INDEX

CITATIONS

Cases:

Statutes:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 30

THE UNITED STATES OF AMERICA, APPELLANT

v.

THE BEACON BRASS CO., INC., AND MAURICE FEINBERG

REPLY BRIEF FOR THE UNITED STATES

Going beyond the single question of statutory onstruction decided by the District Court, the ppellees seek to argue that the indictment was roperly dismissed because (1) the statute of limi-tions had run (Brief 7-9) and (2) their prosecu-on was barred by *res judicata* (Brief 11-14). We hall show here that neither of these contentions is pen on this appeal, and that both are, in any vent, without merit.

I

nly the Question Decided by the District Court—Whether the Indictment Stated an Offense Within Section 145(b) of the Internal Revenue Code—Is Presented by This Appeal

"The exceptional right of appeal given to the overnment by the Criminal Appeals Act"

(*United States* v. *Borden Co.*, 308 U.S. 188, 192) "contemplates vesting this court with jurisdiction only to review the particular question decided by the court below for which the statute provides." *United States* v. *Keitel*, 211 U.S. 370, 398. This rule, applied in the cited cases, has been repeatedly reaffirmed by this Court. *E.g.*, *United States* v. *Hastings*, 296 U.S. 188, 192; *United States* v. *Classic*, 313 U.S. 299, 309; *United States* v. *Petrillo*, 332 U.S. 1, 5; *ibid* at 14-15 (concurring opinion of Mr. Justice Frankfurter). We believe that it precludes consideration on this appeal of appellees' arguments based on the statute of limitations and *res judicata*, neither of which was passed upon in the court below and the latter of which was not even raised there.

This Court has rejected efforts far more plausible than the present one to broaden the settled scope of review under the Criminal Appeals Act. In *United States* v. *Borden Co.*, *supra*, for example, the Court held that "When the District Court has rested its decision upon the construction of the underlying statute this Court is not at liberty to go beyond the question of the correctness of that construction and consider other objections to the indictment. The Government's appeal does not open the whole case." 308 U.S. at 193. And this restriction, strictly enforced, required limitation of the appeal to the precise questions of statutory construction upon which the District Court had passed, foreclosing other attacks against the validity of the indictment based on other arguments construing

the underlying statute. The District Court had dismissed an indictment under Section 1 of the Sherman Act on the ground that the defendants were variously exempted from such prosecution by the Agricultural Marketing Agreement Act of 1937 and the Capper-Volstead Act. Rejecting the District Court's views, this Court reversed, refusing to consider, *inter alia*, the contention of the defendant labor officials that the Sherman Act was inapplicable to labor unions or labor union activities. Reiterating the "well settled" rule "that where the District Court has based its decision on a *particular construction* of the underlying statute, the review here under the Criminal Appeals Act is confined to the question of the propriety of *that construction*" (308 U.S. at 207; emphasis added), the Court said: "The District Court did not construe the Sherman Act as inapplicable to these defendants and the Government's appeal, under the restriction of the Criminal Appeals Act, does not present that question." *Id.* at 208.

Here, the argument against consideration of questions not decided below is even clearer. Here, where the single issue resolved by the District Court and presented by the Government's appeal requires construction of the underlying statute, the additional issues appellees seek to raise are sharply different and almost wholly unrelated in character. This is a peculiarly appropriate case, in our view, for reaffirmation of the holdings that where the District Court "has rested its decision upon the invalidity or construction of the statute which under-

lies the indictment, this Court will not go beyond those grounds and consider other objections to the indictment." *United States* v. *Hastings, supra*, at 192.[1]

---

[1] The propriety of this conclusion is not altered, in our view, by the recent decision in *United States* v. *Spector*, 343 U.S. 169. There, on the Government's appeal under the Criminal Appeals Act, this Court reversed a dismissal of an indictment under Section 20(c) of the Immigration Act of 1917, as amended, 8 U.S.C., Supp. V, 156(c), holding that the District Court had erred in concluding that the statute was unconstitutionally vague and indefinite. Having disposed of this issue, the Court went on to say (p. 172):

> Another question of constitutional law is pressed upon us. It is that the statute must be declared unconstitutional because it affords a defendant no opportunity to have the court which tries him pass on the validity of the order of deportation. That question was neither raised by the appellee nor briefed nor argued here. If it had been, we might consider it. See *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 330. But when a single, naked question of constitutionality is presented, we do not search for new and different constitutional questions. Rather we refrain from passing on the constitutionality of a phase of a statute until a stage has been reached where the decision of the precise constitutional issue is necessary. See *United States* v. *Petrillo, supra*.

This suggestion that a second constitutional issue might have been considered, though it had not been passed upon by the District Court, does not aid the appellees here. For it merely reflects the special rule announced in the *Curtiss-Wright* decision (the relevant passage of which is cited in the portion of the *Spector* opinion we have quoted) which has never been thought to be inconsistent with the prior and subsequent decisions we rely upon as controlling here. This rule—that grounds of constitutional invalidity not specifically passed upon by the District Court may be examined before reversing a decision holding the statute invalid—leaves otherwise intact the general rule that on the Government's appeal "review is confined to the questions of statutory construction and validity decided by the District Court." *United States* v. *Classic*, 313 U.S. 299, 309.

II

The Contention That Prosecution Is Barred by the Statute of Limitations Is, In Any Event, Without Merit

The appellees contend that "the crime was complete when the defendant filed the alleged fraudulent return" (Brief 8) and that the prosecution for the subsequent false statements to Treasury agents, though brought within six years, is precluded by the statute of limitations, which has run against an attempt to prosecute on the basis of the return. In a sense this argument is merely a variant of the argument that the false statements to Treasury agents could not constitute a violation of Section 145(b). For if, as we have sought to show in our main brief, the offense can be committed by means of such statements, it makes no difference that the offense can be, and may have been, committed by other means on another occasion.[2] This does not necessarily mean, of course, that the appellees in this case could have been convicted and sentenced twice—once for the false return and again for their false oral statements, assuming that the attempted evasion was the same in both cases. Cf. *United States* v. *Adams*, 281 U.S. 202. It only means that

[2] It is interesting to note in this connection that the appellees, seeking to defend the District Court's decision on other grounds, have all but abandoned the single ground advanced by that Court. The appellees not only concede, but insist, that a false tax return can serve as a method of committing a crime under Section 145(b). If they are right in this, as we think they clearly are, the District Court was wrong in holding that false statements punishable under former Section 35(A) of the Criminal Code cannot be violative of Section 145(b). In this respect, we pointed out at p. 15 of our main brief, it is all one whether the false statements are written or oral.

the appellees, merely by assuming *arguendo* that they were once guilty of a crime for which they cannot be prosecuted, are in no position to claim that they could thereafter engage with impunity in the willful attempts to evade which constitute that crime.

This Court's decision in *United States* v. *Johnson*, 319 U.S. 503, squarely refutes the appellees' argument. There, conviction for the willful attempt denounced by Section 145(b) was held proper as to defendants who had nothing to do with the taxpayer's false return. The acts for which those defendants were convicted both preceded and followed the filing of returns (319 U.S. at 515), and included false statements to government agents. See our main brief, p. 15, n. 8. The appellees here are surely no better off for their insistence that they themselves could, but for the statute of limitations, have been prosecuted for filing a false return.

The conclusion that a willful attempt to evade taxes cannot be made after the tax return has been filed would fail as an original proposition after brief reflection on our taxing system. That system, contemplating that taxpayers are liable either to make mistakes or be dishonest, provides in detail for efforts toward tax assessment and collection following the filing of a return. For example, Section 57 of the Internal Revenue Code provides that "As soon as practicable after the return is filed the Commissioner shall examine it and shall determine the correct amount of the tax."

Section 276(a) provides that "In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time."[3] And Section 293(a) provides a five percent addition to any deficiency resulting from negligence, while subsection (b) of the same section imposes an addition of fifty percent where "any deficiency is due to fraud with intent to evade tax * * *." These provisions are merely illustrative of a fact which is common knowledge—that the Government's agents are under a duty to continue, frequently for some time after an honestly mistaken or fraudulent return has been filed, the work of collecting taxes.

In these efforts, as in the initial return, the gist of the problem is discovery of the economic facts upon which the tax is predicated. Willful attempts at evasion through concealment and misrepresentation may be perpetrated, therefore, by actions subsequent to the return as well as in the return itself. Cf. *Levy* v. *United States*, 271 Fed. 942 (C.A. 3) (conviction for false amended return though no such return required or provided for by statute); *Norwitt* v. *United States*, 195 F. 2d 127, 133-134 (C.A. 9), certiorari denied, October 13, 1952, No. 57, this Term (same, rejecting argument that "once the attempt has been consummated by

[3] See *Goldberg* v. *Commissioner*, 100 F. 2d 601 (C.A. 7), certiorari denied, 307 U. S. 622; *Howell* v. *Commissioner*, 175 F. 2d 240 (C.A. 6); *Greenfeld* v. *Commissioner*, 165 F. 2d 318 (C.A. 4).

the filing of a false and fraudulent return in any particular year, the offense has been completed for that year"); *United States* v. *Smith*, 13 F. 2d 923, 924 (W. D. La.) (any act, "such as the making of a fraudulent original return, or the filing of subsequent fraudulent proofs, affidavits, etc., whether they be in the nature of an amended return or what not, where the effect and reasonable purpose would be to evade or defeat the tax, would constitute the offense"). Indeed, it is entirely possible that a taxpayer, after filing a merely mistaken return, might subsequently lie after discovering his mistake in an effort to conceal it and evade his taxes, committing the offense for the first and only time by these later actions. Cf. *United States* v. *Adams*, 281 U.S. 202, 205.

Against these considerations, the appellees insist in vain that the offense could only have been committed if they filed a false return—a fact which is, of course, not established by the record in this case—and not thereafter, as the indictment alleges.

III

The Defense That the Indictment Is Barred By *Res Judicata*, If Open Here, Must Nevertheless Fail

Raising this defense for the first time in this Court, the appellees argue (Brief 11-12) that the question presented by the Government's appeal "is the exact question decided by the memorandum opinion and decision dismissing the first indictment [R. 7-8, 10-11] as it is the basis for the conclusion that the indictment was duplicitous." The

record, which shows that the issue presented in this case was not presented or resolved in the earlier case, refutes this contention.

The prior indictment (R. 7-8), like the present one (R. 2), charged the making of false statements to Treasury representatives on October 24, 1945. Unlike the present indictment, the earlier one went on to allege that these false statements were made "for the purpose of supporting, ratifying, confirming and concealing the fraudulent and incorrect statements and representations made in the corporate tax return * * * on or about January 5, 1945 * * *." Moving to dismiss (R. 9), the appellees made no mention of the contention that the false statements of October, 1945, could not constitute a violation of Section 145(b)—a contention they now claim was sustained by the granting of their motion. Instead, they pleaded (1) the statute of limitations and (2) that the indictment was "duplicitous in that it charges violation of 26 U. S. C. Section 145(b) and Title 18 U. S. C. Section 80." And it was these precise defenses, neither of which concludes the merits of the present indictment (see *United States* v. *Oppenheimer*, 242 U. S. 85, 87; *Restatement, Judgments*, § 49), which resulted in dismissal of the first indictment.

Dismissing the first indictment, Judge Sweeney held (R. 10) that, because more than six years had elapsed since the filing of the allegedly false return, prosecution under Section 145(b) on the basis of that return was barred. Turning to the

subsequent false statements, Judge Sweeney wrote (R. 11):

> The present indictment in one count seeks to revive the action by charging a violation of 26 U. S. C. A. § 145 (b), *plus the making of false statements at a hearing and conference* before the representatives and employees of the United States Treasury Department on October 24, 1945. *This is bad pleading.* If the United States wanted to allege a violation of 18 U. S. C. A., (1940 ed.) § 80, (18 U. S. C. A., § 1001, 1948 ed.), for the making of false statements, it should have set it forth succinctly in the language of the statute. The statute of limitations having run, the action could not be revived by the mere charge of subsequent false statements. [Emphasis added.]

It is clear, of course, that the Government might in that first indictment have charged the two offenses to which the District Judge referred, regardless of whether only a single punishment would have been permissible. *Cf. Gaunt* v. *United States*, 184 F. 2d 284 (C. A. 1), certiorari denied, 340 U. S. 917. It is equally clear that the Court read the indictment as attempting such a charge, and held the indictment duplicitous, as the appellees had contended it was, for this reason.

The appellees insist, however, that this conclusion necessarily resulted from an assumption that the false oral statements of October, 1945, could not constitute the offense of willful attempt to

evade under Section 145(b) of the Internal Revenue Code. They press this analysis of Judge Sweeney's reasoning despite the fact that there is no statement of such a ground for the dismissal either in the opinion or in the motion which that opinion sustained. The short answer, we think, is that this speculative logic, nowhere expressed in the record, cannot conclude an issue which, for all that appears, was never considered at all by Judge Sweeney. What is decisive here is that the first indictment (apart from the limitations question, which is considered above) was dismissed for duplicity, not for the conclusion on the merits which the appellees seek to read into that adjudication.

Judge Sweeney's finding of duplicity may have been wrong. It may, in addition to the expressed reasoning, which does not support the appellees' contention, have been predicated on a variety of reasons, logical or illogical. The appellees suggest no reason why, where an indictment has been held invalid as duplicitous, the Government may not seek another indictment which remedies this asserted defect merely because the finding of duplicity may conceivably have resulted from an unexpressed view on the merits. Whatever its reasoning, whether correct or incorrect, a dismissal which is not on the merits adjudicates only the procedural question on which it is based. *Cf. Restatement, Judgments,* § 67. Having sought precisely such an adjudication, the appellees have no ground for asserting that it must now be read as

a judgment on the merits which their motion to dismiss neither sought nor required.

We note, finally, that the nature of this argument emphasizes the impropriety of the effort to present it on this limited appeal under the Criminal Appeals Act. The argument involves construction of two indictments, a function peculiarly appropriate for the District Court in the first instance. *Cf. United States* v. *Borden Co., supra,* at 193. It poses for the first time here a claim that appellees obtained in the first prosecution a ruling which they do not appear to have sought. Apart from any question of this Court's power, it is an argument, we submit, which should be left for the District Court. *Cf. United States* v. *Malphurs,* 316 U. S. 1, 3.

Respectfully submitted.

ROBERT L. STERN,
Acting Solicitor General.

MARVIN E. FRANKEL,
Special Assistant to the Attorney General.

OCTOBER 1952.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1952 227014 841

Office - Supreme Court, U. S.
FILED
OCT 13 1952
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1952.

No. 30.

THE UNITED STATES OF AMERICA, APPELLANT,

v.

THE BEACON BRASS CO., INC., AND MAURICE FEINBERG, APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR THE BEACON BRASS CO., INC. AND MAURICE FEINBERG.

MAGUIRE, ROCHE & GARRITY,
RICHARD MAGUIRE,
PAUL G. COUNIHAN,
Attorneys for Appellees.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

Subject Index.

Table of Authorities Cited.

Cases.

STATUTES.

Supreme Court of the United States.

OCTOBER TERM, 1952.

No. 30.

THE UNITED STATES OF AMERICA, APPELLANT,

v.

THE BEACON BRASS CO., INC., AND MAURICE FEINBERG, APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR THE BEACON BRASS CO., INC., AND MAURICE FEINBERG.

Opinion Below.

The memorandum opinion of the District Court was not reported but is found in the Record (R. 5-6).

Jurisdiction.

This appeal was taken by the United States under the Criminal Appeals Act, 18 U.S.C. § 3731, the dismissal in the District Court having been based in part upon the construction of the Federal statute upon which the indictment was founded.

Questions Presented.

(1) Was the indictment found six years next after the alleged offense was committed?

(2) Does the indictment state an offense within the terms of 26 U.S.C. § 145 (b)?

(3) Is the dismissal of a previous indictment for the same offense *res judicata* and so a complete bar to this indictment?

Statutes Involved.

(1) Section 145 (b) of the Internal Revenue Code (26 U.S.C. § 145 (b)) provides:

> "Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony, and, upon conviction thereof, be fined not more than $10,000 or imprisoned for not more than five years, or both, together with the costs of prosecution."

(2) Section 35 (A) of the Criminal Code (18 U.S.C. (1946 ed.) § 80; now 18 U.S.C. § 1001) provides, in pertinent part:

> ". . . whoever shall knowingly and wilfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, re-

ceipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States . . . , shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

(3) Section 3748 (a) of the Internal Revenue Code (26 U.S.C. § 3748 (a)) provides in part:

"No person shall be prosecuted, tried, or punished, for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense, except that the period of limitation shall be six years—

"(1) . . .

"(2) for the offense of wilfully attempting in any manner to evade or defeat any tax or the payment thereof, and . . ."

Statement.

(1) On March 16, 1951, an indictment was returned against the appellees, Beacon Brass Company, a corporation, and Maurice Feinberg, its president and treasurer, in the District Court for the District of Massachusetts. The indictment charged that, in violation of Section 145 (b) of the Internal Revenue Code (*supra*, p. 2), the appellees had wilfully and knowingly attempted to defeat and evade a large part of the taxes due and owing by the corporation for the fiscal period ending October 31, 1944, by making

false and fraudulent statements and representations at a hearing before Treasury Department representatives on October 24, 1945, and on other occasions thereafter, concerning payments and disbursements made by the corporation *for the purpose of supporting, ratifying, confirming and concealing the fraudulent and incorrect statements and representations made in the corporate tax return of the corporation for the fiscal period ending October 31, 1944, filed on or about January 5, 1945* (R. 7, 8).

(2) On April 6, 1951, the appellees filed a motion to dismiss on the following grounds:

(*a*) That the indictment was not found within six years next after the alleged offense was committed.

(*b*) That the indictment is duplicitous in that it charges violation of 26 U.S.C. §145 (b), and 18 U.S.C. § 80 (R. 9).

(3) On April 27, 1951, after hearing evidence, Sweeney, Ch. J., ordered the indictment dismissed. In its memorandum the court found that the indictment was duplicitous and that the statute of limitations had run. As to the latter ground, the court found as a fact, after hearing evidence, that the corporate return was filed on January 15, 1945; that the six-year statute of limitations commenced to run on that date; that since the indictment was not returned until March 16, 1951, the statute of limitations had run and "could not be revived by the mere charge of subsequent false statements" (R. 10, 11).

(4) On May 28, 1951, the United States filed notice of appeal (R. 11), and on June 11, 1951, designation of record (R. 11). On June 29, 1951, however, the United States filed a stipulation withdrawing its appeal (R. 12).

(5) On September 14, 1951, a second indictment was returned against the appellees, again charging a violation of section 145 (b) by the corporation for the same fiscal year ending October 31, 1944. The only difference is that in this second indictment no reference is made to the filing of the corporate tax return on or about January 5, 1945, except by implication from the use of the words "additional unreported net income" (R. 2).

(6) On November 23, 1951, the appellees again filed a motion to dismiss, setting forth as grounds for dismissal:

(*a*) That the indictment was not found within six years next after the alleged offense was committed;

(*b*) . . .

(*c*) That the indictment does not state an offense within the terms of 26 U.S.C. § 145 (b) (R. 3).

(7) On December 4, 1951, there was a hearing on appellee's motion to dismiss before McCarthy, J., at which time the entire record relating to the prior indictment, including Judge Sweeney's findings of fact, was put into evidence.

(8) On January 10, 1952, the court again dismissed the indictment. In the memorandum the court adopted the finding of Sweeney, Ch. J., that the statute of limitations had run. Further, the court said: "The only difference, therefore, between this indictment and the [prior] indictment . . . is that no mention is made here by the Government of the fact that the Corporation filed its tax return in January of 1945." As an additional reason the court held that the act alleged in this indictment was not such an act as was contemplated by the provisions of Section 145 (b).

Summary of Argument.

I. THE ALLEGED CRIME OF TAX EVASION WAS COMPLETE ON JANUARY 15, 1945, THE DAY THE CORPORATE TAX RETURN WAS FILED, AND HENCE THE STATUTE OF LIMITATIONS HAS RUN.

The court found as a fact that the corporate tax return was filed on January 15, 1945. The Government in the first indictment charged that the appellees wilfully attempted to evade taxes by filing a false return on that date. The cases hold that the crime of tax evasion was then complete and so the statute of limitations starts to run. Any indictment returned after January 15, 1951 is barred.

II. THE INDICTMENT FAILS TO STATE A CRIME WITHIN THE PROVISIONS OF 26 U.S.C. § 145 (b).

A. False statements do not constitute a crime within the provisions of Section 145 (b).

False statements by themselves are not the affirmative conduct required by Section 145 (b).

B. The false statements as made in the case at bar do not come within the provisions of Section 145 (b).

In view of the findings of fact and the history of the previous indictment, the false statements in the case at bar do not constitute a crime under Section 145 (b).

III. THE DISMISSAL OF THE EARLIER INDICTMENT IS A COMPLETE BAR TO THIS INDICTMENT FOR THE SAME OFFENSE.

Sweeney, Ch. J., dismissed the prior indictment on the grounds that the statute of limitations had run. The statute of limitations is a plea to the merits and, once decided, it cannot be reopened in a later prosecution.

Argument.

I. THE ALLEGED CRIME OF TAX EVASION WAS COMPLETE ON JANUARY 15, 1945, THE DAY THE CORPORATE TAX RETURN WAS FILED, AND HENCE THE STATUTE OF LIMITATIONS HAS RUN.

The corporate tax return was found by the court to be filed on January 15, 1945. This indictment was returned on September 14, 1951.

The cases under section 145 (b) are clear that, whenever the taxpayer wilfully files a fraudulent return with intent to defeat a part or all of the tax, the crime is complete as soon as the filing takes place. *Guzik* v. *United States*, 54 F. (2d) 618; cert. den. 285 U.S. 545.

In the *Guzik* case the court said, at page 619: "The contention is made and is here rejected, that an assessment of the deficiency tax due is necessary before the taxpayer can be prosecuted criminally for the charges preferred. The crime is complete when the violator has, as in this instance, knowingly and wilfully filed fraudulent returns with intent to evade and defeat a part or all of the tax."

In *Cave* v. *United States*, 159 F. (2d) 464, the defendant contended that an indictment charging him with filing a false and fraudulent return on January 15, 1945, was insufficient to sustain a conviction, on the ground that, since his tax was not due until March 15, there could be no criminal attempt to defeat or evade prior to that time. The court said, at page 467, that the defendant's argument was fallacious. "A taxpayer whose returns are made on a calendar year basis may file his return with the Collector on or before the 15th of March following the close of the calendar year, Sec. 53 (a)(1) Internal Revenue Code, 26 U.S.C.A. Internal Revenue Code Sec. 53 (a)(1); and the tax shall be paid on the fifteenth day of March following the close of the calendar year, Sec. 56 (a)"; and "it may

be paid . . . prior to the date prescribed for its payment, Sec. 56 (d). The crime denounced by Sec. 145 (b) of wilfully attempting to defeat or evade the tax is complete when the taxpayer wilfully and knowingly files a false and fraudulent return with intent to defeat or evade any part of the tax due the United States."

The law, then, is clear that in the case at bar the crime was complete when the defendant filed the alleged fraudulent return. Indeed, an examination of the two indictments shows beyond any doubt the purpose of the Government in bringing the second indictment. As already noted, the Government actually instituted an appeal from this court's decision which dismissed the first indictment, No. 51-55, on the grounds that it was duplicitous, and that the statute of limitations had run. Subsequently, this appeal was withdrawn, and a new indictment was brought, in which the substance of the charge was not changed one iota, merely the wording. The Government seems to feel that, by eliminating in the indictment any reference to the fact that the corporation did actually file its tax return on January 15, 1945, it gets away from the cases that hold that the crime is complete on that date. The fact that the corporate return was filed on January 15, 1945, was in evidence before both judges.

Now the defendant does not dispute that Section 145 (b) contemplates that many methods can be used to accomplish the crime. Nor would the recitation in one count of several methods used be duplicitous. But, as noted above, when the defendant wilfully filed the false return, the crime was complete. So, when the Government in its frantic effort to keep the statute from running charged the defendants with making false statements in October, 1945, it charged, if anything, a violation of 18 U.S.C. § 1001.

To follow the Government's position to its logical conclusion indicates that the statute of limitations would in

effect never run. A defendant in his desire to escape prosecution is bound to do or say something that would keep the statute running according to the Government's interpretation. Clearly, under the cases the crime of tax evasion in the case at bar was complete upon the filing of the return. By setting out the alleged perjury on October 24, 1945, the Government charged another crime, and this subsequent and different offense certainly does not toll the statute, which expired on January 15, 1951.

II. The indictment fails to state a crime within the provisions of 26 U.S.C. § 145 (b).

A. False statements do not constitute a crime within the provisions of Section 145 (b).

Section 145 (b) provides that a taxpayer may be prosecuted for having wilfully attempted "in any manner to evade or defeat any tax." In *Spies* v. *United States*, 317 U.S. 492, the Court pointed out that the affirmative, wilful attempt necessary under Section 145 (b) may be inferred from conduct, such as keeping a double set of books, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the same kind, the likely effect of which would be to mislead or conceal. Obviously, the use of the words "in any manner" is intended to be a comprehensive concept, but it definitely requires *affirmative* conduct on the part of the taxpayer. False statements made to Treasury Agents are not affirmative conduct in this sense. It is rather an effort in a negative sense to cover up affirmative conduct that has already occurred. The false statements go to the wilfulness of the affirmative conduct. They would be evidence for the Government in proving that the affirmative con-

duct (whatever it was) was wilful. Standing by themselves, false statements do not qualify for the *affirmative* conduct required by Section 145 (b). A close examination of all tax fraud cases, moreover, fails to disclose any prosecution on the sole ground of fraudulent statements made to Treasury Agents such as is set forth in the case at bar. The defendant submits that the act of lying to the Treasury Agents as is alleged in this indictment is not such an act as was contemplated by the provisions of Section 145 (b).

B. The false statements as made in the case at bar clearly do not come within the provisions of Section 145 (b).

The District Court in its memorandum concluded "that the act alleged in this indictment is not such an act as was contemplated by Section 145(b)" (R. 6). In reading this statement it should be borne in mind that the statement was made in view of the evidence before the court. There was in evidence a finding of fact that the corporate tax return had been filed on January 15, 1945. There was also in evidence the previous indictment in which the Government charged this corporate tax return had been filed on January 15, 1945, by the appellees wilfully with knowledge of its falsity. Finally, there was in evidence the complete history of the previous criminal indictment, including the stipulation finally withdrawing the Government's appeal. In view of all this evidence, the court's conclusion that "the act alleged" does not fall within the terms of Section 145 (b) is clearly right. The crime was complete when the false statements were made, and the Government is simply using the false statements in this case to try to keep the statute of limitations running. It is submitted that the false statements under the circumstances as made in the case at bar are not a crime within Section 145 (b).

III. THE DISMISSAL OF THE EARLIER INDICTMENT IS A COMPLETE BAR TO THIS INDICTMENT FOR THE SAME OFFENSE.

This appeal arises under the provisions of the Criminal Appeals Act (18 U.S.C. § 3731), permitting direct appeal where the dismissal in the court below was based on the construction of a statute. The Court has, however, been reluctant to construe a statute where such is not necessary to the determination of the case. Cf. *United States* v. *Borden Co.*, 308 U.S. 188. Appellees then feel that it is appropriate to point out to the Court that the defense of *res judicata* is available to them, that it is not among the defenses and objections covered by Rule 12 (b) (2), which must be raised before trial, and that it has, therefore, not been waived. It is also perhaps appropriate to state that a dismissal based on *res judicata*, being a bar to the action, is one which may be taken to the Supreme Court on direct appeal and is therefore more suitable for the Court's present consideration than another defense might be.

The doctrine of *res judicata* is applicable to criminal as well as to civil litigation, especially as to matters which were previously decided and not merely open to argument. *United States* v. *Oppenheimer*, 242 U.S. 85.

As has been pointed out, the two indictments charge the identical acts with being violations of section 145 (b); they differ only as to the purposes alleged. However, in both it is clear that the ultimate purpose was the evasion of taxes owing by the Beacon Brass Co., Inc., for the fiscal period ending October 31, 1944, and in both it is clear that a tax return had been filed which did not report all the income. The United States in this appeal states the question to be:

> "Whether a willful attempt to evade and defeat taxes by making false and fraudulent statements and representations to representatives of the United

States Treasury Department violates Section 145 (b) of the Internal Revenue Code . . .''

This is the exact question decided by the memorandum opinion and decision dismissing the first indictment as it is the basis for the conclusion that the indictment was duplicitous.

The indictment was duplicitous in charging both a violation of Section 145 (b) and also a violation of Section 35 (A) of the Criminal Code (18 U.S.C. § 1001); in the words of the memorandum, ''a violation of 26 U.S.C.A., 145 (b), plus the making of false statements . . .'' This duplicity is not a technical defect which the Court can overlook, as the finding of duplicity is necessarily based on a finding that the making of such false statements is not a violation of section 145 (b).

> ''Coming to the question whether the indictment was duplicitous, it is well settled that duplicity in criminal pleading is the joinder of two or more separate and distinct offenses in the same count in an indictment or information, not the charging of a single offense involving a multiplicity of ways and means of action and procedure. The offense charged in each count of this indictment was the devising of a scheme to defraud, and for obtaining money or property by means of false and fraudulent pretenses, representations, and promises, and of using the mails for the purpose of executing the scheme or attempting so to do. It was a single offense consisting of those two elements. The scheme, as laid out in the indictment, involved a multiplicity of ways and means of action and procedure, but it was a single scheme. And setting out the numerous ways and means of action and

procedure included in the scheme for its accomplishment did not render the indictment duplicitous."

United States v. *Crummer*, 151 F. (2d) 958, 963, 964 (1945); cert. den. 327 U.S. 785.
Cf. *Frankfurt Distilleries* v. *United States*, 144 F. (2d) 824, 832.

If, therefore, the false statements to the Revenue Agents were elements of the violation of Section 145 (b), the indictment would not have been duplicitous, and a necessary implication of the decision is that the false statements did not violate Section 145 (b), but violated only Section 35 (A) of the Criminal Code.

However, the lower court did not decide only that the earlier indictment was duplicitous; it was also decided that the statute of limitations had run. "The six year statute of limitations against the filing of a false return in violation of 26 U.S.C.A. Section 145 (b) commenced to run on that date. The indictment in this case was not returned by the Grand Jury until March 16, 1951, which is well over the six year period." And, in conclusion, with especial reference to the false and fraudulent statements, the court stated: "The statute of limitations having run, the action could not be revived by the mere charge of subsequent false statements." This brings this case squarely within the precedent of the *Oppenheimer* case, in which the Court stated:

"Of course the quashing of a bad indictment is no bar to a prosecution upon a good one, but a judgment for the defendant upon the ground that the prosecution is barred goes to his liability as matter of substantive law and one judgment that he is free as matter of substantive law is as good as another. A plea

of the statute of limitations is a plea to the merits, *United States* v. *Barber*, 219 U. S. 72, 78, and however the issue was raised in the former case, after judgment upon it, it could not be reopened in a later prosecution." (242 U.S. at 87, 88.)

Conclusion.

For the reasons stated, the judgment of the District Court dismissing the indictment should be affirmed.

Respectfully submitted,

MAGUIRE, ROCHE & GARRITY,
RICHARD MAGUIRE,
PAUL G. COUNIHAN,
Attorneys for Appellees.